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Supreme Court of the United States

OCTOBER TERM, 1961

No. 631

ROBERT MURRAY McINTOSH, PETITIONER,

versus

UNITED STATES, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT MURRAY McINTOSH,
Petitioner.

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Supreme Court of the United States

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No. .....

ROBERT MURRAY McINTOSH, PETITIONER,

versus

UNITED STATES, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Robert Murray McIntosh, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

CITATIONS OF OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is set forth in a *per curiam* opinion. It is shown in the Appendix to this petition as Exhibit "C". The Order of the United States District Court for the Eastern District of South Carolina is shown in the Appendix to this petition as Exhibit "E". This Court's attention is in-

vited to the fact that the District Court and the Appeals Court did not give a detailed written opinion.

JURISDICTION OF THIS COURT

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered November 1, 1961.

IN RESPECT OF ORDER STAYING MANDATE

On December 5, 1961, an Order of the United States Court of Appeals for the Fourth Circuit was entered staying the mandate of that court so that petitioner may apply for a writ to that court provided the application for a writ of certiorari is filed in the Supreme Court within 30 days from December 1, 1961. This Order is shown in the Appendix to this petition as Exhibit "A".

STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION ON THIS COURT

The statutory provision believed to confer jurisdiction on this Court is:

U. S. C., Title 28, Section 1346 (b).

THE QUESTION PRESENTED FOR REVIEW

Whether the United States has waived sovereign immunity in tort actions against the United States based upon the negligence of agents of the United States in decisions concerning the sanity or insanity of citizens of the United States.

STATUTE INVOLVED

28 U. S. C. 1346(b) provides in pertinent part as follows:

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1954, for injury or loss of property, or personal

injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT OF THE CASE

Petitioner instituted this action for damages under the Federal Tort Claims Act, 28 U. S. C. 1346 (b), in the United States District Court for the Eastern District of South Carolina on June 15, 1960. The complaint is shown as Exhibit "D" to this petition. Petitioner did not attempt to recover damages for each specific fact alleged in the complaint. Petitioner seeks to maintain this action on the allegations of the negligence of Respondent's agents acting within the scope and course of their employment in determining petitioner to be disabled due to mental disorders in that the said agents in the use of due and ordinary care should have determined that petitioner is not now and has never been disabled due to mental disorders. Paragraphs 2 and 13 of the complaint are sufficient allegations of these facts. Counsel for the Respondent agreed that the physical disability referred to in paragraph 13 of the complaint meant a disability due to mental disorders. In this connection, Counsels for Respondent in the trial court as well as the appeals court did not object to petitioner's statement of the case.

Respondent made a motion for a nonsuit in the trial court. Both parties submitted written briefs to the Honorable C. C. Wyche, United States District Judge for the Western District of South Carolina, sitting by designation in the Eastern District of South Carolina. The trial court entered its Order on May 18, 1961, wherein it found that

the complaint must be dismissed on the grounds that the Court does not have jurisdiction to hear and determine the alleged cause of action in this controversy.

Petitioner appealed the Order of the trial court to the United States Court of Appeals for the Fourth Circuit. Both parties submitted printed briefs and oral arguments were made on October 24, 1961, before Chief Judge Simon E. Sobeloff, Judge Albert V. Bryan and Judge J. Spencer Bell of the United States Court of Appeals for the Fourth Circuit. The appeals court entered a per curium opinion and judgment on November 1, 1961, wherein the appeals court affirmed the judgment of the trial court. The trial court and the appeals court did not give a detailed opinion. Chief Judge Sobeloff of the United States Court of Appeals for the Fourth Circuit granted petitioner a stay in the execution of the mandate of that court provided petitioner filed a petition for a writ of certiorari to that court with the Supreme Court within 30 days from December 1, 1961.

The petitioner now respectfully applies to this Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit in the hopes that this Court will review the legal issues involved in this action and render an opinion on those legal isues.

THE BASIS FOR FEDERAL JURISDICTION IN THE TRIAL COURT

The district court had jurisdiction by virtue of the Federal Tort Claims Act, 28 U. S. C. 1346 (b).

REASONS WHY THE WRIT SHOULD BE GRANTED

Whereas petitioner did not directly raise the Constitutional issue of violation of due process of law in this case, the outcome of this litigation will certainly bear directly on this point. If federal officials have such board discretionary

authority with respect to determining the insanity of a person subject to their jurisdiction that they may negligently and wrongfully commit that person to a locked ward in a federal hospital, then it follows that a legal lopehole exists whereby a person's wrongful incarceration may be legal and proper.

The study of the legal and constitutional rights of the mentally ill in criminal as well as civil aspects has concerned the United States Senate as well as the courts, legal profession and psychiatrists. The determination by this Court whether the United States is liable for negligent decisions of federal agents with respect to the sanity of a person under the Federal Torts Claims Act will greatly aid Congress and those concerned with these problems.

ARGUMENT

Petitioner elected to present only one question to be determined by the trial court, appeals court and this Court. Whereas counsels for Respondent did not object to petitioner's statement of the case or question presented, counsels for Respondent did elect to ignore Petitioner's question and proceeded to present many uncontested questions which were not properly before the lower courts. Petitioner will comment briefly on the uncontested questions presented by counsels for the Respondent in the lower courts. Counsels for Respondent reminds one of a person who knew nothing about white but knew a lot about black; when asked about white, he talked about black.

Counsels for Respondent argued that the two year statute of limitations barred action on all claims except the one alleged in paragraph 13 of the complaint which concerned the Army Board for the Correction of Military Record's negligent decision with respect to petitioner's mental disorders. Petitioner had clearly stated in the briefs below

as well as again in this petition that petitioner is not pressing for recovery for any alleged tort except the one contained in paragraph 13 of the complaint. This statute issue was not properly before the lower courts or this Court.

Counsels for Respondent argued that petitioner could not recover for injuries suffered while a member of the United States Army, where injuries occurred incident to his military service while he was being treated in Japan and Korea. Paragraphs 9 and 13 of the complaint clearly show petitioner had not connections with the Army since his discharge on December 28, 1953 until his appeal to the Army Board for Correction of Military Records about August 18, 1958, a period of over four and one half years. Since November, 1953, petitioner has not been examined by any army doctor or had any direct contact with the Army. Again, petitioner is not pressing for recovery for any injury which occurred while he was on active duty with the Army or while he was in a foreign country. These matters may be evidential bearing on the issue whether petitioner has ever been disabled due to mental disorders but these matters are not proper legal questions before the lower courts or this Court.

Counsels for Respondent did not raise the question in the appeals court whether petitioner had exhausted his administrative remedies. Petitioner has in fact exhausted his administrative remedies and this question is not before this Court.

Counsels for Respondent did argue one point which bears on petitioner's question in that Respondent argues that the actions of the Army Board were based upon the exercise or performance or the failure to exercise or perform a discretionary function. The question whether federal officials or boards have such broad discretionary authority that they may negligently and wrongfully determine

a person to be disabled due to mental disorders is properly before this Court. As indicated in paragraphs 9 and 13 of the complaint, petitioner remained a civilian for over five years until the Secretary of the Army negligently and wrongfully retroactively retired him due to mental disorders on January 30, 1959. Petitioner sought a public retraction of his army records which indicated he had mental disorders, or in the alternative, retirement as a first lieutenant with one hundred per cent pay in his appeal before the Army Board. Petitioner was forced to request the retired pay as an alternative because petitioner was aware that his civilian career would continue to be blocked so long as the wrongful record was maintained by the Army or any federal agency. Petitioner did not get the public retraction or the one hundred per cent retired pay. Petitioner got only fifty per cent. The Army Board failed in every respect to grant petitioner's request for justice and fair play. Petitioner was not permitted to have counsel before the Army Board's hearing. There was no physical examination made or requested by the Army Board. This Court should determine whether the Army Board has such broad discretionary powers.

Petitioner is more concerned with the effect of the wrongful decision upon his civilian career than the effect upon his former military career. As indicated in paragraphs 10 and 12 of the complaint, the Veterans Administration became involved in this case when in April, 1955, it negligently and wrongfully held petitioner one hundred per cent mentally incompetent for a period of over one year from April 1955 until June 1956.

Petitioner and counsels for Respondent were unable to find any former decisions relative to the question in this case. Certainly, a case on malpractice of a federal doctor for a physical injury would not control as a decision on

mental disorders in this case was finally made by an administrative board. The federal courts have however held that psychiatrist and personnel at the Veterans Administration Hospitals must exercise due care in the treatment and care of mentally ill patients and failure to exercise due care will make the United States liable under the Federal Torts Claims Act; (*Lange v. U. S.*, 179 F. Supp. 777 (Dist. Ct. N. Y. 1960)). Certainly, the failure to exercise due care with respect to a decision concerning mental disorders would have even greater and more far reaching consequences as such decisions could result in the wrongful deprivation of a person's liberty.

Such claims asserting negligence in decisions concerning mental disorders could not be said to arise out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights since all these claims imply an intentional or willful act and require a greater burden of proof than the simple failure to exercise due care.

Counsels for Respondent argued in the appeals court that if these matters are subject to review at all, it would appear that it would be one in an action for extraordinary relief against the Secretary involved brought in the District Court for the District of Columbia or for back pay in the Court of Claims. The petitioner is not interested in recovering back pay from the Army; he is interested in the damages done by the wrongful decision on his civilian career. In any event, petitioner would be forced to prove the Secretary acted arbitrarily or capriciously or contrary to law if he appealed the Secretary's decision directly to the courts; (*Furlong v. United States*, 138 Ct. Cl. 843, 845). This would be an almost impossible burden of proof as the Secretary would not be arbitrary in relying on the records of the

Army and Veterans Administration. In any event, it is clear that the negligent and wrongful determination of mental disorders would stand unless petitioner could prove the Secretary acted arbitrarily or capriciously or contrary to law. In addition, petitioner would have to maintain at least two suits, one against the Army and another against the Veterans Administration before the entire record would be corrected. The petitioner and any citizen with a similiar problem would become lost in the legal round robin.

CONCLUSION

For the reasons herein assigned, this Court ought in the interest of clarifying the question of whether the United States is liable for a tort based upon the negligent determination of mental disorders under the Federal Torts Claims Act grant a Writ of Certiorari in this case.

Respectfully submitted,

ROBERT MURRAY McINTOSH,
Petitioner.

Harts ille, South Carolina,
December 14, 1961.

EXHIBIT A—U. S. C. A. ORDER STAYING MANDATE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8413

ROBERT MURRAY McINTOSH, APPELLANT,

versus

UNITED STATES, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT FLORENCE

Upon the application of the appellant, and for good cause shown,

It is ordered that the mandate of this Court in the above-entitled case be, and it is hereby, stayed pending the application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application for a writ of certiorari is filed in the Supreme Court within 30 days from December 1, 1961.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

December 5, 1961.

A TRUE COPY, TESTE:

RICHARD M. F. WILLIAMS, JR.,
Clerk, U. S. Court of Appeals for the Fourth Circuit.

By: MARGARET L. DAVIS,
Deputy Clerk.

EXHIBIT B—JUDGMENT OF U. S. C. A.

JUDGMENT

Filed and Entered November 1, 1961.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8413

ROBERT MURRAY McINTOSH, APPELLANT,

versus

UNITED STATES, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of South Carolina, and was argued by appellant and by counsel for appellee.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

ALBERT V. BRYAN,
United States Circuit Judge.

J. SPENCER BELL,
United States Circuit Judge.

Filed:
November 1, 1961.

R. M. F. WILLIAMS, JR.,
Clerk.

EXHIBIT C—PER CURIAM OPINION OF U. S. C. A.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8413

ROBERT MURRAY McINTOSH, APPELLANT,

versus

UNITED STATES, APPELLEE

APPEL FROM THE UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT FLORENCE
C. C. WYCHE, DISTRICT JUDGE

(Argued October 24, 1961. Decided November 1, 1961)

Before SOBELOFF, Chief Judge, and BRYAN and BELL, Circuit Judges.

Robert Murray McIntosh, Pro Se, and Sherman L. Cohn, Attorney, Department of Justice, (William H. Orrick, Jr., Assistant Attorney General; Terrell L. Glenn, United States Attorney, and John G. Laughlin, Attorney, Department of Justice, on brief) for Appellee.

PER CURIAM:

This is the plaintiff's appeal from the dismissal of his action brought against the United States under the Federal Tort Claims Act.

We find no error, and the judgment is

Affirmed.

EXHIBIT D—COMPLAINT

(Filed June 15, 1960, Ernest L. Allen
C. D. C. U. S. E. D. S. C.)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF SOUTH
CAROLINA, FLORENCE DIVISION

Civil Action No. 7245

ROBERT MURRAY McINTOSH, PLAINTIFF,

versus

UNITED STATES, DEFENDANT

COMPLAINT

The Plaintiff complaining of the Defendant alleges:

1. Plaintiff is a citizen of the United States. Defendant is the Government of the United States.

2. Notwithstanding that Defendant's agents' torts commenced prior to the two year statute of limitation, the alleged torts are continuing ones up until the date of the filing of this complaint.

3. Most of the facts alleged in this complaint were contained in Civil Action No. 5562 of this Court. This action was withdrawn with a voluntary nonsuit without prejudice on January 24, 1957.

4. Defendant's agents were apparently acting within the scope of their employment at the time the various acts related herein occurred.

5. On or about April 25, 1953, Defendant's agent, a ward man or doctor, negligently administered no less than ten dope injections into the plaintiff's arm at a United States Army Hospital in Pusan, Korea. At this time, plaintiff was serving in the United States Army. As a result of the dope injections, plaintiff suffered from critical shock and feared death. Plaintiff was negligently treated as a mental case.

6. Thereafter, plaintiff was negligently committed to a locked ward in a U. S. Hospital in Japan.

7. At the U. S. Army Hospital in Japan, Defendant's agents negligently had radio programs and movies played before Plaintiff relative to Plaintiff's shocked condition at the time concerning a dead king. This shocked condition about a dead king was a result of Defendant's agents' torts. This act aggravated Plaintiff's condition. Plaintiff's request for correct information was negligently denied.

8. Plaintiff was negligently retained in locked wards at various army hospitals until about the last of August 1953, during which time he received improper and negligent treatment.

9. Plaintiff was improperly and negligently discharged from the United States Army December 28, 1953, by reason of mental disorders at Fort Bragg, North Carolina.

'0. As a result of Defendant's negligence and failure to relate the truth to the Plaintiff, Plaintiff suffered severe mental pains, was unable to secure employment and made constantly aware of the serious and grave and spiritual consequences that may be derived from his conduct. All Plaintiff's attempts to seek an honest understanding of his condition so that his actions would not adversely affect any moral law abidir g citizen were in vain. These factors compelled Plaintiff to enter the Lenwood (Veterans Administration) Hospital, Augusta, Georgia about the middle of April, 1955.

11. On or about May 1, 1955, Defendant's agents, a doctor and two ward boys, at the above mentioned VA Hospital stated falsely and negligently that Plaintiff had stated Plaintiff was going to kill himself. This act aggravated Plaintiff's condition.

12. Plaintiff was negligently retained against his consent after he had demanded his release in writing from the aforesaid institution from June 1, 1955 until June 7, 1955, at time he was negligently released against medical advise. As a result of the negligent decision at the VA Hospital, Plaintiff was at that time considered one hundred per cent mentally disabled.

13. On or about August 18, 1958, Plaintiff entered an appeal before Army Board for Correction of Military Rec-

ords, Washington, D. C. The Board failed to give Plaintiff notice of the hearing, failed to permit plaintiff to attend the hearing and negligently recommended Plaintiff's retirement from the army as first lieutenant due to physical disability. Plaintiff was negligently retired from the army by reason of physical disability by Special Orders No. 21, Department of the Army, dated 30 January 1959.

14. On or about September 16, 1959, Army Board for Correction of Military Records negligently held that it was detrimental to the public interest for the Plaintiff to see the record of the hearing of the Plaintiff's own case before the Army Board for the Correction of Military Records.

15. As a result of these prolonged series of negligent acts by Defendant's agents, Plaintiff has suffered great mental, physical and spiritual pains which can never be given a monetary value and has been unable to pursue his profession and offer his services to the public without fear and deceit.

WHEREFORE, Plaintiff demands judgment against Defendant in the sum of One Million ($1,000,000.00) Dollars, such other relief as the court may deem just and proper, and the costs of this action.

/s/ ROBERT MURRAY McINTOSH,
Attorney for Plaintiff,
1503 Carolina Ave.,
Hartsville, South Carolina.

Dated: June 14, 1960.

[SEAL] A TRUE COPY, ATTEST:

/s/ ERNEST L. ALLEN,
Clerk of the U. S. District
Court, East. Dist. of So.
Carolina.

EXHIBIT E—ORDER OF U. S. D. C.

[Caption Omitted]

ORDER

The above case is before me upon motion of the defendant to dismiss the complaint upon the grounds stated in the notice of the motion.

After a consideration of written briefs of the parties, it is my opinion that this court does not have jurisdiction to hear and determine the alleged cause of action in this controversy. For this reason, it is my duty to dismiss the complaint, and

IT IS, THEREFORE ORDERED, That the complaint in the above-stated case be and the same is hereby dismissed.

C. C. WYCHE,
United States District Judge,
(Sitting by Designation)

Dated:
Spartanburg, South Carolina,
May 17, 1961.

[SEAL] A TRUE COPY, ATTEST:

/s/ ERNEST L. ALLEN,
Clerk of the U. S. District Court, East. Dist. of So. Carolina.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 631

ROBERT MURRAY MCINTOSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court rendered no opinion (see Pet. App. 19). The opinion of the Court of Appeals (Pet. App. 15) is reported at 295 F. 2d 504.

JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1961 (Pet. App. 14). The petition for a writ of certiorari was filed on December 23, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), was properly dismissed by the district court on the ground that the allegedly negligent acts and alleged wrongs are not actionable because: (a) they occurred more than two years prior to the commencement of suit; (b) they occurred while petitioner was on active military service and were incident to that service; or (c) they fall within express exceptions embodied in the Act.

STATUTES INVOLVED

The Federal Tort Claims Act provides in pertinent part as follows:

28 U.S.C. 1346(b):

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2401(b):

> A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues * * *.

28 U.S.C. 2680:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

STATEMENT

Petitioner instituted this action for damages under the Federal Tort Claims Act, 28 U.S.C. 1346(b), on June 15, 1960 (Pet. App. 16). The complaint made several allegations of negligent or otherwise wrongful conduct on the part of government employees. These allegations can be divided into four general categories:

(1) *United States Army.* Petitioner alleged that in 1953, while he was in the Army and stationed in Korea and Japan, he was negligently diagnosed "as a mental case," treated with dope injections and otherwise, improperly exposed to radio programs and

movies, refused correct information, and retained in locked wards at various Army hospitals (Pet. App. 16-17).

(2) *Army discharge.* Petitioner alleged that he was "improperly and negligently discharged" from the Army on December 28, 1953, "by reason of mental disorders" (Pet. App. 17).

(3) *Veterans Administration.* Petitioner alleged that in 1955, when he was treated at a Veterans Administration hospital, he was negligently diagnosed as one hundred percent mentally disabled, informed that he had stated that he would kill himself, and "retained against his consent after he had demanded his release in writing," and then "negligently released" (Pet. App. 17).

(4) *Army retirement.* Petitioner alleged that on January 30, 1959, he was "negligently retired from the army by reason of physical disability" [1] upon the negligent recommendation of the Army Board for Correction of Military Records and after the Board "failed" to give petitioner notice of a hearing and to permit him to attend the hearing (Pet. App. 18).

The government moved for dismissal of the complaint on the ground that (1) the claims are not covered by the Federal Tort Claims Act in that they fall within the explicit exceptions for acts taking place in a foreign country, or constituting assault, battery, and false imprisonment, or based upon the exercise of a discretionary function, 28 U.S.C. 2680(a), 2680(h), 2680(k); (2) the claims arising out of acts

---

[1] Petitioner was retired as a first lieutenant (Pet. App. 18).

allegedly committed before June 15, 1958, are barred by the two-year limitations period of 28 U.S.C. 2401 (b); and (3) the claims arising out of acts occurring while petitioner was in the United States Army arose out of or in the course of activity incident to military service and are therefore outside of the coverage of the Act (R. 8).

The District Court, noting the grounds stated in the government's motion to dismiss, ordered the dismissal of the complaint (Pet. App. 19). In so doing, the court held that "this court does not have jurisdiction to hear and determine the alleged cause of action in this controversy" (Pet. App. 19). The Court of Appeals affirmed in a *per curiam* order (Pet. App. 15).

ARGUMENT

The action of the court below in affirming the district court's dismissal of petitioner's complaint clearly accorded with well-settled law and calls for no review by this Court.

1. It is established that "[s]uits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed." *Munro* v. *United States*, 303 U.S. 36, 41; see also *Soriano* v. *United States*, 352 U.S. 270, 273-75. One restriction imposed by Congress on its grant of jurisdiction to district courts to entertain tort actions against the United States is that these actions be commenced within two years of their accrual. 28 U.S.C. 2401(b). Any action not commenced within this period is "forever barred" and outside the juris-

diction granted district courts under the Federal Tort Claims Act. See *Humphreys* v. *United States*, 272 F. 2d 411 (C.A. 9); *Tessier* v. *United States*, 269 F. 2d 305 (C.A. 1); *Compagnie Generale Transatlantique* v. *United States*, 51 F. 2d 1053 (C.A. 2); cf. *Soriano* v. *United States*, 352 U.S. 270, 273-75.

Petitioner alleges that he was injured by actions of Army medical personnel in Korea and Japan in 1953, by his discharge from active duty with the Army in 1953, by medical employees of the Veterans Administration in 1955, and by his retirement from the Army in January 1959 upon a recommendation of the Army Board for Correction of Military Records in August 1958 (Pet. App. 16-18). It is apparent that all of petitioner's claims, except those referring to the action of the Board for Correction of Military Records and his subsequent retirement, accrued more than two years before the commencement of this action on June 15, 1960 (Pet. App. 16), and are therefore barred by the two-year limitation period of 28 U.S.C. 2401(b).

2. This Court held in *Feres* v. *United States*, 340 U.S. 135, 146, that the United States is not liable under the Tort Claims Act to servicemen for injuries or death that "arise out of or are in the course of activity incident to service." Many of the wrongs of which petitioner complains occurred while he was in the Army in Korea. He developed symptoms that led to his being treated by Army doctors in what was apparently the combat zone. He was then transported to Japan for further treatment by Army doctors and

other medical personnel. It was during the course of this treatment both in the combat area and in Japan that, he alleges, he suffered injuries for which he now seeks compensation. The "service-incident" nature of these injuries (see Pet. App. 16-17) is beyond question.

3. Several of the express exceptions embodied in the Tort Claims Act (28 U.S.C. 2680) serve as a further bar to the maintenance of petitioner's suit.

He asserts (Pet. App. 17) that he was wrongfully committed to locked wards of Army hospitals and that he was retained against his will in a Veterans Administration hospital. This amounts to a charge that he was falsely imprisoned, a tort excepted by 28 U.S.C. 2680(h) from the waiver of sovereign immunity embodied in the Tort Claims Act. See *Klein* v. *United States*, 268 F. 2d 63 (C.A. 2), affirming 167 F. Supp. 410 (E.D. N.Y.). He also alleges that various negligent and wrongful acts were committed against him while he was in the Army and stationed in Korea and Japan (Pet. App. 16-17). His claim based on these alleged wrongs arose "in a foreign country" and is, therefore, barred by the terms of 28 U.S.C. 2680(k). See *United States* v. *Spelar*, 338 U.S. 217; *Burna* v. *United States*, 240 F. 2d 720 (C.A. 4); *Callas* v. *United States*, 253 F. 2d 838 (C.A. 2); *Orion Shipping and Trading Co.* v. *United States*, 247 F. 2d 755 (C.A. 9); *Cobb* v. *United States*, 191 F. 2d 604 (C.A. 9).

Finally, petitioner claims that he was injured by the Army's negligently discharging him from active duty status as an officer in 1953 and its subsequent

negligence in retiring him in 1959 (Pet. App. 17, 18). These actions of the Army, even if done negligently, are not reviewable in a Tort Claims suit, because they fall within 28 U.S.C. 2680(a), which excludes from the coverage of the Act any claim "based upon the exercise [of] * * * a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." See Sections 101, 104 of the Act of June 29, 1948, 62 Stat. 1081, 10 U.S.C. (1952 ed.) 580, 583, now codified as 10 U.S.C. 3784; 10 U.S.C. 1201, 1206; *Creary* v. *Weeks*, 259 U.S. 336; *Orloff* v. *Willoughby*, 345 U.S. 83.

4. Moreover, it is apparent that any damages sought for petitioner's discharge or retirement from active duty would be in lieu of the pay and allowances to which he would be entitled while on active duty less the pension which he has received on retirement. Yet Congress has specifically decreed that "The district courts shall not have jurisdiction" (under the Federal Tort Claims Act or otherwise) "of (1) Any civil action or claim for a pension; (2) Any civil action to recover fees, salary, or compensation for official services of officers or employees of the United States." 28 U.S.C. 1346(d). See *Burrell* v. *Martin*, 232 F. 2d 33 (C.A.D.C.); *Angilly* v. *United States*, 199 F. 2d 642 (C.A. 2); *Hunter* v. *United States*, 183 F. 2d 446 (C.A. 4).[2]

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[2] Petitioner also alleges certain irregularities in his retirement process (Pet. App. 18). A tort action in the District Court for the Eastern District of South Carolina is neither the action nor the place to obtain review of such matters. If these matters are subject to review at all, see *Harmon*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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v. *Brucker*, 355 U.S. 579, it would appear that it would be only in an action for extraordinary relief against the Secretary brought in the District Court for the District of Columbia or for back pay in the Court of Claims. *Hunter* v. *United States*, 183 F. 2d 446 (C.A. 4).

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